MALAYSIAN REPORTS

SYARIKAT PERNIAGAAN KETUA KAMPONG KUALA SELANGOR SDN. BHD. v. ZAKARIA BIN HUSIN

[S.C. (Seah, Mohamed Azmi & Syed Agil Barakbah S.C. JJ.) September 20 & 21, 1984 & January 5, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 111 of 1984]

Tort – Negligence – Action against several defendants – Default judgment obtained against one defendant – Whether this precludes proceedings against other defendants – Claim in the alternative – Particulars of negligence

Practice and Procedure – Claim against several defendants – Default judgment obtained against one defendant – Whether this precludes proceedings against other defendants – R.H.C. 1980, O.13 r.2.

In this case the respondent sustained personal injuries arising out of an accident in a forest logging area. He claimed damages against three defendants. He obtained judgment in default of appearance against the third defendant. The case proceeded against the first and second defendants. The learned trial judge dismissed the respondent's claim against the first defendant but entered judgment against the second defendant (the appellant). The appellant appealed on the question of liability. The learned trial judge found that the third defendant was the servant or agent of the appellant and that the appellant was the occupier of the said land. He also held that the respondent though not a servant of the third defendant was not a trespasser but an employee of the appellant. On appeal it was argued (a) that the respondent having obtained default judgement against the third defendant as his employer was estopped from proceeding against the appellant and the other defendant on the ground that the default judgement is final on the issue of liability for negligence; (b) that the learned judge was wrong in considering the evidence of events that occurred after the accident in order to determine who was the employer of the appellant; (c) that the learned judge erred in law in finding the appellant liable in negligence based on evidence not pleaded in the particulars of negligence.

Held: (1) in this case the respondent sued all the defendants jointly and severally and also in the alternative. He is therefore not precluded from proceeding against the other defendants including the appellant after obtaining default judgment against the third defendant;

(2) it was necessary and proper for the learned judge in this case to consider the evidence of events that occurred after the accident in order to determine who was the employer of the respondent;

(3) in this case sufficiently fair notice was given to the opposing party of the issues to be raised although not precisely directed towards the absence of a hand-rail or support on the truck. The fact that one of the sleepers broke thereby dislodging one of the rails on the day of the accident was conceded. The rest are based on evidence which has been satisfactorily presented and developed in the proceedings to enable a decision to be arrived at and which has not in any way caught the appellant by surprise;

(4) there was more than ample evidence for the learned judge in this case to conclude that it could not be disputed that in the circumstances the system of transportation as provided was not safe for any attendant.

Cases referred to :

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd* [1964] M.L.J. 49, 52.
(2) *Bullock* v. *London General Omnibus Co.* [1907] 1 K.B. 264.
(3) *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland and Wife* [1903] 1 K.B. 64.
(4) *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail* [1981] 2 M.L.J. 10, 11-12.
(5) *Siti Aishah binti Ibrahim* v. *Goh Cheng Hwai* [1982] 2 M.L.J. 124, 126.
(6) *Playing Cards (Malaysia) Sdn Bhd* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.

SUPREME COURT.

R.R. Sethu for the appellant.

K. Kirubakaran for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court) : This is an appeal against the decision of the High Court Judge, Kuala Lumpur, made on March 15, 1984 against the appellant (second defendant in the Court below) who was held liable to the plaintiff/respondent in damages for personal injuries sustained by the latter arising out of an accident in a forest logging area. The original claim by the respondent was against the three defendants. He obtained judgment in default of appearance against the third defendant who was subsequently called as a defence witness (D.W.5) during the proceeding against the first and second defendants. At the end of the trial, the learned Judge dismissed the respondent's claim against the first defendant with no order as to costs but entered judgment against the second defendant with costs. The second and third defendants were ordered to pay the respondent the sums of $75,000/- in general damages, $32,514/- in damages for loss of future earnings and $12,960/- as special damages. The appeal is against such part only of the said decision as decides that the appellant was liable to the respondent in damages, *i.e.* on the question of liability.

The salient facts as accepted by the learned Judge were that the accident occurred on May 26, 1979. The scene was in a forest logging area at Batu 6, Sungei Tinggi, Tanjong Karang, Selangor. About one week or so before the accident, the respondent was employed as an attendant on a line

of loco trucks that were being used to carry felled timber in the said logging area. There were fifteen trucks attached to one another in a row and running on four iron wheels on rails which in turn rested on parallel wooden sleepers similar to railway lines. They were being pushed from the rear by an engine. Each truck comprised of a bare wooden platform 3 feet x 6 feet.

On the day of the accident at about 8.00 a.m., the respondent while proceeding to the logging site to collect timber sat on the foremost truck at the front-most part facing forward with his hands holding to the front sides of the platform. There were no hand-rails or support on any of the trucks to enable him to hold on to. The trucks were being pushed by the loco from the rear and proceeding at human walking speed. The loco was being driven by P.W.5 and P.W.6, the rail repairer, was seated on the fourth truck behind the respondent. After travelling for about three miles, the foremost truck on which the respondent was sitting skidded resulting in the respondent falling in front of it and the still moving truck colliding into his back, thereby causing the respondent to lose consciousness and to suffer serious injuries, particularly to the spine due to the fracture of the twelfth thoracic vertebra and resulting in paralysis of the lower limbs. (See pages 155, 156 and 157 of record).

At the commencement of the proceedings by consent of both parties, four issues were posed before the learned Judge for his consideration. Having regard to the certain questions of law that were argued before us, we think it is appropriate to mention the issues and the decision of the Judge. The issues are:-

(1) whether the appellant was the servant or agent of the first defendant (S.C.B.);

(2) whether the third defendant (D.W.5) was either the servant or agent of either the first defendant or the appellant or both;

(3) whether the first defendant or the appellant was the occupier of the land where the accident occurred; and

(4) whether the respondent was the servant or agent of the third defendant or a mere trespasser on the loco truck.

The learned Judge after full hearing answered the first issue in the negative. As regards the second, he concluded that the third defendant was the servant or agent of the appellant but not the first defendant; and with regard to the third issue, the appellant was the occupier of the said land. Lastly, relating to the fourth issue, he concluded that the respondent though not a servant of the third defendant was not a trespasser but an employee of the appellant. It was after considering these issues that the learned Judge arrived at his conclusions and gave his decisions.

Originally, there were six grounds of appeal, but counsel for the appellant proceeded only on four grounds, *viz.* grounds 1(a) and (b) and 2(a) which he dealt with together, ground 3 and lastly grounds 5 and 6 which he also dealt with together. The other parts of grounds 1 and 2 and ground 4 were abandoned.

It was submitted that the respondent having obtained default judgment against the third defendant as his employer under Order 13 Rule 2 Rules of High Court 1980 was estopped from proceeding against the appellant and the other defendant on the ground that the default judgment is final on the issue of liability for negligence.

Order 13 Rule 2 states:

"Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

The effect of this rule is that such a judgment is interlocutory only as to the amount and is final as to the right of the plaintiff to recover damages together with such costs, to which he would be entitled when the amount is ascertained. (See *White Book 1982*, page 141 para 13/2/1). According to the law in England, which is the law applicable to this case, a default judgment is capable of giving rise to an estoppel *per rem judicatam*, but it must be subjected to a more restricted operation. It must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided. Estoppel arises only where the determination has been decided necessarily and with complete precision. (See *Kok Hoon* v. *Leong Cheong Kweng Mines Ltd.*[1]).

In that case, there were two separate actions by the appellant who having obtained judgment by default against the respondent for arrears of certain rentals filed a subsequent action for monies alleged to be due to him. He objected to a defence of set-

off defences based on certain provisions of the Moneylenders Ordinance and the Bill of Exchange Ordinance put in by the respondent on the ground that the latter was estopped from raising them by virtue of a previous judgment given at an earlier action between the same parties. In the High Court, the validity of this objection was raised, argued and decided as a preliminary point. It was upheld by the High Court but reversed by the Court of Appeal who decided there was no estoppel. ([1962] M.L.J. 224). On appeal, the Privy Council upheld the decision of the Court of Appeal. Although in the appeal before us, the objection raised referred to only one and the same action in which default judgment was obtained against one of the defendants, the principles applicable, in our view, are the same as in the case cited above. Be that as it may, the first point which we want to emphasise is that such objection was never raised as a preliminary point in the Court below. In normal circumstances, estoppel must be expressly pleaded except in cases where it arises after the close of the pleading as in present case. The objection should have therefore been raised at the earliest possible opportunity, *i.e.* as a preliminary issue before the trial. That was not done. On the contrary, the appellant's counsel consented to the four issues being presented for the consideration of the Judge as the decisive factors in the determination of the whole case. The appellants' counsel had agreed to the issues and in particular the second issue on which the learned Judge held that the third defendant was the servant or agent of the appellant. Having gone to that extent, we are of the opinion that it was too late for the appellant's counsel to raise the issue of estoppel in the appellate stage based on the default judgment obtained by the respondent against the third defendant in the Court below. (See *Bullock* v. *London General Omnibus Co.*[2]). As said by Viscount Radcliffe in *Kok Hoong's case* (*supra*) at page 52:

"There is obvious and indeed grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."

Now turning to the main ground, it is an accepted principle that Order 13 Rule 2 applies to cases where the plaintiff's right of action against one of two or more defendants is based on their joint liability and it does not apply where the claim is made in the alternative. [See *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland and Wife*[3] and *Bullock* v. *London General Omnibus Co.* (*supra*)].

In the first case cited above, the plaintiffs filed an action against either the husband or the wife alternatively for the price of goods taken by the latter as necessaries supplied for the household on the order of the wife. The plaintiffs after obtaining leave under Order XIV signed judgment for the amount claimed against the wife who had separate property. It was held that the signing of the judgment against the wife was a conclusive election by the plaintiffs to rely on her liability and they could not afterwards insist on the liability of the husband. The *ratio decidendi* is based on the principle that the plaintiffs having obtained judgment against the wife on the footing that she was severally liable as the principal cannot now turn around and say that she was an agent for the purpose of imposing liability upon her husband as the principal. "If it is sought to render the real principal liable, then the agent must be treated as such and not as principal." [Per Collins M.R. in *Morel Brothers & Co.* (*supra*) page 76]. Secondly, although the case was based on Order 14 Rule 5 Rules of High Court and involved a debt arising out of a contract, the same principle applies to a claim in tort. We share the view that there is no distinction in this respect between the law applicable to torts and that applicable to contract. [See Collins M.R. in *Bullock* v. *London General Omnibus Co.* (*supra*) page 271].

Applying the principles to the present case, we do not think that the respondent should be precluded from applying Order 23 Rule 2 by proceeding with the action against the other defendants including the appellant after obtaining default judgment against the third defendant. A careful scrutiny of the amended pleadings shows that the respondent sues all the defendants jointly and severally and also in the alternative. According to paragraphs 5 to 8, he not only pleaded that he was at all material times jointly and severally employed by each of the three defendants respectively but also that the third defendant was the servant or agent of the second defendant and the latter was servant or agent of the first defendant. Paragraphs 9 to 15 of the pleadings are pleaded in a similar vein. We reproduce paras 9 and 10 as illustrations.

9. On May 26, the plaintiff was employed *by the first defendant and/or the second defendant, its servant or agent or the third defendant* together with the other employees to work in the said jungle at the said premises.

10. In the course of the said employment while the plaintiff was sitting in a loco truck owned *by the first defendant and/or the second defendant, its servant or*

agent, or, the third defendant when the said loco truck skidded causing the plaintiff to fall and be subsequently run over by the said loco truck and by reason whereof sustained injuries, loss and damage."
(Emphasis ours).

We are of the view in the circumstances that the third defendant is included in the phrase "its servant or agent" appearing in both paragraphs and in the other subsequent paragraphs in the pleading. The third defendant is therefore sued jointly and severally in his capacity as the agent or the servant in the first part by the words".....the first and/or the second defendant, its servant or agent....." and alternatively by the words "or the third defendant" in the later part in his capacity as the principal. That, in our view, is sufficient to dispose of the question of estoppel.

As regards ground 3, we do not find it to be of substance at all because it was necessary and proper for the learned Judge to have considered the evidence of events that occurred after the accident in order to determine who was the employer of the plaintiff/respondent. The evidence of relationship affecting the appellant and the first defendant are not only relevant but essential for the determination posed by the four issues, in particular the first issue. The only point worthy of mention is the written report of the accident (Ex. P5) which was made on behalf of the first defendant and signed by D.W.3 as the employer. According to the evidence of the respondent, D.W.3 was associated with the appellant and it was admitted by D.W.3 that he was a director of the appellant company. It was submitted that by the letter Exhibit P5 the learned Judge came to the wrong conclusion that the respondent was the employee of the appellant at the material time. Having perused the evidence, we are satisfied that the learned Judge has adequately considered relevant evidence both oral and documentary, heard and made observations of witnesses whose evidence he accepted as true and correctly based his conclusion on reasonable inferences arising from the facts and circumstances of the case. He accepted the evidence of P.W.5 and P.W.6 who were workers like the respondent that D.W.3 paid their wages. He concluded there was relationship between the first defendant and the appellant who held shares in the former since January 17, 1980 and that the appellant by contract had undertaken the whole operation of extracting timber from the logging area for the first defendant in return to paying monthly contribution to the latter according to the agreement and had the full control thereof. He also dealt with the letter P5 which apart from being attached to a forwarding letter signed by D.W.4, the secretary of the appellant (Ex. P4), and addressed to the Labour Department, Rawang, Selangor on the request of D.W.3, bears the same address as the appellant. He also took into consideration that D.W.3 apart from being a director of the appellant also paid sums of money totalling $1,300/- to P.W.2, the respondent's father, after the accident. He also considered the letter (P3) from the Labour Department giving the amount of compensation due to the plaintiff and addressed to the appellant. These were some of the relevant factors which the learned Judge had taken into consideration as basis for his conclusion with which we agree with respect.

The last two grounds are dealt with together. Ground 5 alleges that the learned Judge erred in law in finding the appellant liable in negligence based on evidence which are not pleaded in the particulars of negligence. It was submitted that in his grounds of judgment, the Judge made the following finding:-

"It is not disputed that nothing was provided in the way of a hand-rail or support on any truck for its passenger to hold on to and it is also not disputed that the accident occurred because one of the sleepers broke thereby dislodging one of the rails and this caused the plaintiff's truck to skid resulting in the plainfiff being thrown off it. In my view, it cannot also be disputed that in the circumstances the system of transportation which was provided was not safe for any attendant."

Having regard to the particulars of negligence pleaded at paragraph 11 of the amended statement of claim, (see page 18 of record), we are of the view that sub-paragraphs (i), (ii), (iii) and (iv) have given sufficiently fair notice to the opposing party of the issues to be raised although not precisely directed towards the absence of a hand-rail or support on the truck. The fact that one of the sleepers broke thereby dislodging one of the rails on the day of the accident was conceded. The rest are based on evidence which has been satisfactorily presented and developed in the proceeding to enable a decision to be arrived at and which, in our view, has not in any way caught the appellant by surprise. (See *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail*[4] and *Siti Aishah binti Ibrahim* v. *Goh Cheng Hwai*[5]). This is a case in which justice required that substantive issues between the parties be considered [*Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*[6]]. The evidence showed that the respondent was employed as an attendant of a loco truck and his duty was to go to the logging area on the truck to remove logs. He was initially instructed by the

locomotive driver P.W.5 to sit on the foremost edge of the front truck. He did so by holding the front edge of the floorboard. There was no hand-rail or other support to enable him to hold on to. The respondent's evidence in this respect was never challenged, but on the contrary corroborated by P.W.5 and by documentary evidence such as the photographs. Apparently, the trucks could not and did not have any hand-rail or other support since they were used for carrying timber logs. There was therefore sufficient evidence for the learned Judge to come to his findings.

The last ground 6 involved a question of fact. Although P.W.6, the truck repairer, testified that as late as the evening before the accident he checked the trucks and found them in order, he admitted that on the morning in question he was travelling with the respondent and P.W.5 who wanted to go and repair a broken sleeper about three miles away from the starting point. Apart from the above, P.W.6 also admitted that every day one or two sleepers would be broken and he had to do the repairs. There was therefore more than ample evidence for the learned Judge to conclude that it could not be disputed that in the circumstances the system of transportation as provided was not safe for any attendant.

For these reasons, we dismiss the appeal with costs. Deposit to the respondent to account for costs.

Appeal dismissed.

Solicitors: *Adnan, Sundra & Low; Kam Woon Wah & Co.*

RASIAH MUNUSAMY v. LIM TAN & SONS SDN. BHD.

[S.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani S.C.JJ.) February 21, December 10 & 11, 1984 & March 6, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 132 of 1983]

Contract – Building contract – Oral agreement – Dispute as to area of land and balance of purchase price – Housing Developers (Control and Licensing) Rules, r.12 – Specific Relief Act, 1950, s. 18.

Housing Developers – Oral agreement not complying with rules – Protection – Housing Developers (Control and Licensing) Rules, 1970, r.12.

In this case the appellant alleged that the respondent had orally agreed to sell and transfer to the appellant a double storey terrace house which the respondent undertook to build. There was a dispute as to the area of the land and the balance of the purchase price and it was alleged that the appellant refused to pay the final balance of $5,298/-. The respondent claimed that the agreement had been repudiated on the ground of the refusal to settle the balance of the agreement, damages and other ancillary relief.

The learned trial judge rejected the appellant's claim on the extra land and he accepted the respondent's evidence that the purchase price was $30,000/- comprising $28,500/- the original cost of the property and $1500/- as the cost of extra works requested by the purchaser. The learned judge also found that the amount actually due and payable to the respondent was only $2808/- and not $5928/- as claimed. He therefore held that the purported repudiation by the respondent was improper and not valid. On the alternative defence that the oral agreement was not valid under rule 12(1) of the Housing Developers Rules, 1970, the learned trial judge held that since only the method or mode of entering into the agreement was in contravention of the law, the verbal agreement was valid and enforceable. However the learned Judge dismissed the appellant's claim as he held that he would not be entitled to vacant possession or transfer until the balance with interest was settled. The appellant appealed.

Held: (1) although the oral agreement did not comply with the provision of rule 12(1) of the Housing Developers (Control and Licensing) Rules, 1970, the appellant-purchaser clearly belongs to a class for whose protection the statutory prohibition is imposed and as such the appellant can enforce his right for specific performance of the oral contract of sale provided he is a *bona fide* purchaser;

(2) in the circumstances of this case the appellant could not be said to be a *mala fide* purchaser. He cannot be deprived of the protection given by the Housing Developers legislation nor is there justification in holding that the appellant had used the housing developers legislation as an engine of fraud. The appellant has not perpetrated any fraud, legal or equitable, and his claim for specific performance should have been granted;

(3) in this case the delay in the delivery of vacant possession of the housing accommodation must be attributed entirely to the appellant's own conduct in agreeing to perform his obligation under the contract only in accordance with his own erroneous interpretation of it pertaining to the extra land. There was no delay by the respondent in the completion of the building although the vendor committed a breach of contract by refusing to accept payment and to transfer the property. The appellant should therefore not be entitled to any indemnity under rule 12(1)(r) of the Housing Developers (Control and Licensing) Rules. The proper discretion to be exercised in this case is to grant the appellant specific performance of the contract of sale without any compensation under section 18 of the Specific Relief Act, 1950.

Cases referred to:

(1) *Suisse Atlantique Societe* v. *N.V Rotterdamsche Kolen Centrale* [1967] 1 A.C 367, 435.
(2) *Freeth* v. *Burr* (1874) L.R 9 C.P 208, 214.